Supreme Court, U.S.
FILED

001431 MAR 13 2001

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

STEVEN N. HUTCHINSON,

Petitioner,

v.

WEISS, PECK & GREER, L.L.C., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

JEFFREY L. LIDDLE
Counsel of Record
LAURENCE S. MOY
LIDDLE & ROBINSON, L.L.P.
685 Third Avenue
New York, New York 10017
(212) 687-8500
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

HMPP

QUESTIONS PRESENTED

1. Whether the Second Circuit departed from decisions of other Courts of Appeals and from this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.* when it summarily dismissed discrimination claims despite acknowledging proof of a prima facie case and proof of pretext?

2. Whether the Second Circuit, in view of *Reeves* and other precedent, may determine genuine issues of material fact and deny a jury trial notwithstanding 29 U.S.C. § 626(c)(2)?

LIST OF PARTIES

In accordance with Rule 14.1 and Rule 24.1(b) of the Rules of the Supreme Court of the United States, the following is a list of all parties to the proceeding in the United States Court of Appeals for the Second Circuit:

1. Steven N. Hutchinson, Plaintiff/Petitioner;
2. Weiss, Peck & Greer, L.L.C., Defendant/Respondent;
3. Weiss, Peck & Greer, (a general partnership), Defendant/Respondent;
4. WPG CDA III, L.P., Defendant/Respondent;
5. WPG CDA III (Overseas), L.P., Defendant/Respondent;
6. WPG Private Equity Partners, L.P., Defendant/Respondent;
7. WPG Private Equity Partners (Overseas), L.P., Defendant/Respondent;
8. WPG Private Equity Partners II, L.L.C., Defendant/Respondent;
9. WPG Private Equity Partners II (Overseas), L.L.C., Defendant/Respondent;
10. Wesley W. Lang, Jr., Defendant/Respondent;
11. Philip Greer, Defendant/Respondent;
12. Steven Weiss, Defendant/Respondent;
13. Peter B. Pfister, Defendant/Respondent;

LIST OF PARTIES – Continued

14. Craig S. Whiting, Defendant/Respondent;

15. Nora E. Kerppola, Defendant/Respondent;

16. Kenneth J. Hanau, Defendant/Respondent;

17. WPG Corporate Development Associates III, L.P., Defendant/Respondent;

18. WPG Corporate Development Associates III (Overseas), Ltd., Defendant/Respondent;

19. WPG Corporate Development Associates IV, L.P., Defendant/Respondent;

20. WPG Corporate Development Associates IV (Overseas) Ltd., Defendant/Respondent;

21. WPG Corporate Development Associates V, L.P., Defendant/Respondent;

22. WPG Corporate Development Associates V (Overseas), L.P., Defendant/Respondent.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED IN THE CASE 1

STATEMENT OF THE CASE 2

JURISDICTION OF THE DISTRICT COURT 5

ARGUMENT 6

I. THE SECOND CIRCUIT HAS REJECTED *REEVES v. SANDERSON PLUMBING* BY CONTINUING TO REQUIRE THAT PLAINTIFFS ASSERTING DISCRIMINATION MUST SHOW PROOF *BEYOND* THE PRIMA FACIE CASE AND SUFFICIENT EVIDENCE FOR A JURY TO REJECT THE EMPLOYER'S REASON FOR ITS ADVERSE ACTION 6

II. PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT IMPROPERLY DETERMINED GENUINE ISSUES OF FACT AND MADE CREDIBILITY DETERMINATIONS 11

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Blow v. City of San Antonio, 236 F.3d 293 (5th Cir. 2001) 8

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986) 11

Conner v. Schrader-Bridgeport Int'l, Inc., 227 F.3d 179 (4th Cir. 2000) 9

Evans v. City of Bishop, 238 F.3d 586 (5th Cir. 2000) 8

Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997) 6, 7, 8, 9

Fiter v. Digital Equip. Corp., 232 F.3d 3 (1st Cir. 2000) 9

Gallo v. Prudential Residential Services, Ltd., 22 F.3d 1219 (2d Cir. 1994) 11

James v. New York Racing Assoc., 233 F.3d 149 (2d Cir. 2000) 7, 8

Reeves v. Sanderson Plumbing Prods., Inc, 530 U.S. 133, 120 S. Ct. 2097 (2000) 6, 7, 8, 9, 11

Schnabel v. Abramson, 232 F.3d 83 (2d Cir. 2000) 7, 8

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742 (1993) 7, 14, 15

STATUTES

28 U.S.C. § 1254 (1) 1

29 U.S.C. § 1331 5

29 U.S.C. § 621 4

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. § 623(a) 1, 2

29 U.S.C. § 626(c) 1

29 U.S.C. § 626(c)(1) 5

29 U.S.C. § 626(c)(2) 11, 16

Fed. R. Civ. P. 56(c) 1, 2, 11

Fed. R. Civ. P. 1 ..... 1, 2, 10

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (Stein, J.) is unpublished. The Summary Order of the United States Court of Appeals for the Second Circuit is also unpublished. The Summary Order and District Court opinion are reprinted in the appendix.

JURISDICTION

The District Court Judgment granting summary judgment for defendants on Mr. Hutchinson's federal claim of age discrimination and dismissing all other claims for lack of subject matter jurisdiction was entered on March 1, 2000. Mr. Hutchinson timely filed a notice of appeal on March 30, 2000. The Summary Order of the Court of Appeals affirming the Judgment of the District Court was filed on December 13, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THE CASE

This case involves statutory provisions 29 U.S.C. § 626(c), 29 U.S.C. § 623(a), and Rules 56 (c) and 1 of the Federal Rules of Civil Procedure ("FRCP"). 29 U.S.C. § 626(c) provides:

> "(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter. . . .

> (2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action."

29 U.S.C. § 623(a) provides:

> "It shall be unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual because of such individual's age. . . . "

Rule 56(c) of the FRCP provides, in pertinent part:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Rule 1 of the FRCP provides, in pertinent part:

> "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

STATEMENT OF THE CASE

On August 19, 1998, Mr. Hutchinson, a former senior Partner and Managing Member of Weiss, Peck & Greer,

L.L.C. ("Weiss, Peck"), filed an action in the District Court against the Weiss, Peck firm and his former partners seeking in excess of $18.75 million and in excess of $25 million in punitive damages based on claims of age discrimination, breach of contract, breach of fiduciary duty, fraud and other claims. (A-12-60)[1] Mr. Hutchinson co-managed Weiss, Peck's Private Equity Group ("PEG"), which raises capital from investors for multi-million dollar private equity funds, and manages the fund investments. (A-479-480) Mr. Hutchinson was 48 years old at the time Weiss, Peck terminated his employment on December 31, 1997, only weeks after Mr. Hutchinson and the PEG had concluded an 18-month effort to raise $229 million for what became the largest fund in Weiss, Peck's history. (A-1644-1647; A-1299; A-481; A-861) The termination took place just one month after Weiss, Peck had announced to investors that a fund co-managed by Mr. Hutchinson was performing well and was expected to yield returns of over 30%. (A-845)

On September 30, 1998, defendants served a motion to dismiss the complaint, or, in the alternative, for summary judgment. (A-72) Defendants argued that Mr. Hutchinson could not state a prima facie case because Philip Greer and Ronald Danenberg, who were older than Hutchinson, were Hutchinson's replacements. (A-99) On March 8, 1999, the District Court denied defendants' motion, with leave to renew following discovery on Mr. Hutchinson's claim under the Age Discrimination in

---

[1] References to "A-___" are to the parties' Joint Appendix, filed with the United States Court of Appeals for the Second Circuit in the proceeding below.

Employment Act ("ADEA"), 29 U.S.C. § 621, et seq., and stayed all other discovery. (A-7)

Following this partial discovery period, on July 26, 1999, defendants made a second summary judgment motion. (A-614-615) The second motion was not a "renewed" summary judgment motion insofar as defendants abandoned grounds they had asserted in their first motion – grounds on which Mr. Hutchinson had based his discovery. Defendants no longer argued that Greer and Danenberg had replaced Mr. Hutchinson.

In its February 29, 2000 opinion, the District Court for the Southern District of New York (Stein, J.) recognized that Mr. Hutchinson's duties were assumed by Wesley Lang, an individual eight years younger than Mr. Hutchinson, and found that an issue existed concerning the pretextual nature of defendants' stated reason for the termination. (App. 18-19)[2] Nonetheless, the District Court granted defendants' second motion for summary judgment on the age discrimination claim and declined jurisdiction over the remaining claims in the case.[3] (App. 11)

---

[2] References to "App. ___" are to the Appendix to this Petition.

[3] When reviewing the District Court Judgment, we respectfully request that this Court note that the District Court misstated the timing of Mr. Hutchinson's hire several times in its opinion. Weiss, Peck hired Mr. Hutchinson in 1993, but the District Court stated that such hire occurred two years later, in 1995. (App. 11, 14) The District Court apparently believed that Hutchinson's younger replacement, Wesley Lang , who was 36 years old when Mr. Hutchinson was hired (A-836), had occupied a similar role for two years prior to Hutchinson's hire,

Thus, after nearly two years of litigation, costly motion practice, and discovery limited to only a fraction of the issues raised by the action, Mr. Hutchinson was left to re-commence his action – this time in the New York state courts. (Under 29 U.S.C. § 626(c)(1), which provides that state courts have concurrent jurisdiction over ADEA claims, the District Court could have shifted all of Mr. Hutchinson's claims to the state courts at the outset of the initial action in 1998.)

Mr. Hutchinson filed his Notice of Appeal on March 30, 2000, appealing from that part of the District Court's Judgment dismissing his claim under the ADEA. The Court of Appeals for the Second Circuit affirmed the Judgment of the District Court by Summary Order filed on December 13, 2000. The Second Circuit's Summary Order is the subject of this proceeding.

JURISDICTION OF THE DISTRICT COURT

The District Court had jurisdiction over Mr. Hutchinson's ADEA claim pursuant to 29 U.S.C. § 1331.

---

when Lang had only occupied such role for – at most – several months on an interim basis.

ARGUMENT

I. THE SECOND CIRCUIT HAS REJECTED *REEVES v. SANDERSON PLUMBING* BY CONTINUING TO REQUIRE THAT PLAINTIFFS ASSERTING DISCRIMINATION MUST SHOW PROOF *BEYOND* THE PRIMA FACIE CASE AND SUFFICIENT EVIDENCE FOR A JURY TO REJECT THE EMPLOYER'S REASON FOR ITS ADVERSE ACTION

In *Reeves v. Sanderson Plumbing Prods., Inc*, 530 U.S. 133, 120 S. Ct. 2097, 2104 (2000), this Court granted certiorari "to resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination . . . , combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." The Court noted the conflict between the Sixth, Eleventh, Third, Eighth, and Ninth Circuits – which recognized that proof of the prima facie case and proof sufficient for a reasonable factfinder to reject an employer's reason were adequate to sustain a finding of discrimination – and the *Second*, Fifth, Fourth and First Circuits.

In delineating the conflict between the Circuits, this Court observed in *Reeves* (120 S. Ct. at 2105) that, in *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (en banc), the Second Circuit required that a "plaintiff must introduce sufficient evidence for [a] jury to find both that employer's reason was false and that [the] real reason was discrimination." This Court rejected the Second Circuit's notion that proof of such "pretext plus" must be shown by a discrimination plaintiff as a matter of law.

Rather, this Court reiterated in *Reeves* the tenet set forth previously in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S. Ct. 2742 (1993), that it is permissible for the factfinder to infer the ultimate fact of discrimination from the falsity of the employer's explanation. *Reeves*, 120 S. Ct. at 2108.

Since *Reeves*, the Second Circuit has dissembled what it had held in *Fisher*. In two post-*Reeves* decisions, *Schnabel v. Abramson*, 232 F.3d 83 (2d Cir. 2000), and *James v. New York Racing Assoc.*, 233 F.3d 149 (2d Cir. 2000), the Second Circuit maintained that *Reeves* did not resolve a conflict after all, since this Court had *misread Fisher* as requiring a plaintiff to present more than prima facie and pretext evidence in order to succeed.

The Second Circuit protested in *Schnabel* (232 F.3d at 89, n. 5) (emphasis added):

> "**It is arguable that the Supreme Court's reading of Fisher was inaccurate.** We read Fisher as consonant with Reeves: Both hold that the quantum of evidence needed to sustain an inference of discrimination is the same as that needed to sustain the ultimate inference in any other civil case. In any event, any possible disagreement about whether Fisher imposed a per se rule requiring in all instances that an ADEA claimant offer more than a prima facie case and evidence of pretext, is rendered moot by Reeves, which now becomes our principal guide on these questions."

In *James*, the Second Circuit accused this Court of creating "confusion" and making a "mistake" in how this Court

read *Fisher*. In *James*, the Second Circuit declared (233 F.3d at 156, n. 3) (emphasis added):

> "As the *Schnabel* opinion points out . . . at n. 5, **the Supreme Court in *Reeves* introduced some confusion** as to the meaning of the *Fisher* opinion. . . . In a parenthetical clause following its citation to *Fisher*, the Court described *Fisher* as requiring that plaintiffs 'introduce sufficient evidence for jury to find both that employer's reason was false *and* that real reason was discrimination.' *Reeves*, 530 U.S. at ___, 120 S. Ct. at 2105 (emphasis added). **With all respect the Court was mistaken.** *Fisher* does not require evidence that the employer's reason was false. It requires only evidence adequately supporting a finding of discrimination."

Certiorari is appropriate here because the Second Circuit – as shown by its Summary Order in this case, and contrary to the other Circuits – has rejected *Reeves'* holdings, protestations to the contrary notwithstanding. Since this Court's decision in *Reeves*, the Circuits that this Court had recognized as part of the *Fisher* camp (the Fifth, Fourth and First Circuits) have accepted that evidence of the *de minimus* prima facie case and pretext evidence can suffice to defeat summary judgment or judgment as a matter of law. *See, e.g., Blow v. City of San Antonio*, 236 F.3d 293 (5th Cir. 2001) (reversing summary judgment, and citing *Reeves* for the proposition that "a trier of fact may infer the ultimate fact of discrimination from the falsity of the employer's explanation"); *Evans v. City of Bishop*, 238 F.3d 586 (5th Cir. 2000) ("Thus, Evans has established a prima facie case of discrimination and put forth sufficient evidence for a fact finder to find Bishop's

proffered reasons to be pretextual. *Reeves* instructs that this showing is usually sufficient for a plaintiff's case to survive summary judgment. . . . "); *see* also *Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179, 194 (4th Cir. 2000) (reversing judgment as a matter of law, and citing *Reeves* for the proposition that "disregarding evidence that supported plaintiff's prima facie case and undermined the employer's nondiscriminatory explanation" constituted misapplication of the standard of review under Rule 50 of the FRCP); *see also Fiter v. Digital Equip. Corp.*, 232 F.3d 3 (1st Cir. 2000) (affirming jury verdict when trial court jury instructions "made no mention of any . . . 'pretext plus' requirement either in terms *or in substance*") (emphasis added).

Here, the Second Circuit acknowledged and assumed proof of the prima facie case (App. 6), and both the Second Circuit and District Court recognized in addition proof of pretext. (App. 6, 19) Yet, the Second Circuit held that the drastic device of summary judgment was appropriate because plaintiff failed to offer something more . . . proof that the pretext was pretext for discrimination (A-6), the same heightened burden the Second Circuit erroneously imposed in *Fisher*, as noted by this Court in *Reeves*. As the Second Circuit declared below: "Even if WPG's stated reason for firing Hutchinson was pretextual, the evidence is insufficient to support a reasonable inference that it was a pretext for age discrimination." *Id.*

As addressed in the second point of this Petition, the Second Circuit may not tether its veiled rejection of *Reeves* to the false notion that Mr. Hutchinson's prima facie proof was "weak." (A-6) Inherent in its argument of

that proposition lurked the Second Circuit's violation of every appropriate standard for summary judgment motions, as that court improperly determined genuine issues of fact, made credibility determinations, regarded evidence from defendants-movants that the court was *not* required to believe, and, throughout, drew inferences and construed ambiguities in favor of movants.

Rule 1 of the FRCP calls for application of the Federal Rules in a manner that is "just, speedy, and inexpensive." Here, the District Court's decision to devote nearly two years of the parties' time on defendants' initial summary judgment motion, partial discovery relating to a fraction of the issues raised by the complaint, and then a second summary judgment motion by the defendants was not just, speedy *or* inexpensive. The Second Circuit Panel, which included the Hon. Robert Chatigny, a visiting judge sitting by designation, could not have reviewed in any meaningful sense the nearly 2,000 pages that comprised the lengthy – yet incomplete – record below. In any event, the Second Circuit should not have affirmed the District Court's misuse of Rule 56. This Court should not approve of the lower courts' application of Rule 56 in a manner that undercuts Rule 1 in every conceivable sense.

II. PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT IMPROPERLY DETERMINED GENUINE ISSUES OF FACT AND MADE CREDIBILITY DETERMINATIONS

The ADEA provides, at 29 U.S.C. § 626(c)(2), that "a person shall be entitled to a trial by jury of any issue of fact" in any action claiming discrimination in violation of that statute. Accordingly, a court may not employ the drastic remedy of summary judgment to deprive a plaintiff of a jury trial except for those rare occasions when- "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548 (1986).

In deciding a motion for summary judgment, a court must draw all inferences and construe all ambiguities in favor of the party against whom summary judgment is sought, and it may not make credibility determinations or weigh the evidence. *See Reeves*, 120 S. Ct. at 2110 (a court must draw all inferences in favor of the non-movant and must refrain from making credibility determinations or weighing evidence when considering a motion for judgment as a matter of law). In determining a summary judgment motion in a discrimination case "[t]he Court's role, in short, is confined at this point to issue-finding; it does not extend to issue resolution." *Gallo v. Prudential Residential Services, Ltd.*, 22 F.3d 1219, 1224 (2d Cir. 1994). "Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves*, 120 S. Ct. at 2110.

Applying these standards here, the Second Circuit was required to accept the following evidence that Mr. Hutchinson's job performance was excellent, and thus that a reasonable jury could find defendants' reason for termination (supposed poor performance) unworthy of belief:

1. In 1996 and 1997, Mr. Hutchinson led a record-breaking effort to raise $229 million in capital for the CDA V fund, which effort represented Mr. Hutchinson's first and foremost job responsibility at the time. (A-1644-1647; A-1299; A-481; A-861)

2. Lang observed that 1996 – the year in which Mr. Hutchinson, Lang and others raised much of the capital for CDA V, and one of the years in which Mr. Hutchinson and Lang co-managed the PEG – was "**the best year in the Private Equity Group's history**." (A-1699) (emphasis added)

3. Mr. Hutchinson co-managed the PEG investment funds successfully, as recognized when defendant Greer told investors in November 1997 that the CDA IV Fund was expected to generate a return in excess of 30%. (A-845)

4. Weiss, Peck compensated Mr. Hutchinson in a manner reflecting the firm's positive view of Mr. Hutchinson's job performance at the relevant time. Weiss, Peck paid Hutchinson approximately $1 million in cash compensation (i.e., exclusive of "carry" interests in the equity funds, which made up the lion's share of Mr. Hutchinson's total compensation) for his services in 1997. (A-1712) Moreover, Mr. Hutchinson's bonus compensation for 1997 increased relative to 1996, and his total cash compensation increased each year from 1993 through 1997. *Id.*

5. Weiss, Peck allocated "carry" or "participating percentages" valued at approximately $28.75 million to Mr. Hutchinson. (A-490-492) These allocations reflected Mr. Hutchinson's substantial efforts and performance with respect to the firm's private equity funds. *Id.*

6. The Weiss, Peck firm employed Mr. Hutchinson for nearly five years, and never indicated to him that his performance was deficient. (A-865-866) Moreover, the firm never gave Mr. Hutchinson a warning regarding job performance (A-866) although such warnings were standard practice at the firm and had been given to Mr. Hutchinson's younger colleagues. (*Id.*; A-1041)

7. At the relevant time, Weiss, Peck praised the investments on which Mr. Hutchinson worked and members of the PEG also praised such investments in contemporaneous evaluations. (A-844-845; A-1694-1706; A-1644-1648)

8. Management teams of companies working with Mr. Hutchinson with respect to the PEG's funds recognized Mr. Hutchinson's positive performance and contributions. (*See, e.g.*, A-1421)

9. Weiss, Peck fired Mr. Hutchinson shortly after he had stated his intention to work until he approached 60 years of age, and after a comment by defendant Whiting concerning his age. (A-487)

10. At the time of termination, Mr. Hutchinson was the oldest member of the PEG, and the only member older than 40. (*Id.*; A-1641)

11. Weiss, Peck replaced Mr. Hutchinson with Wesley Lang, who is eight years younger than Mr. Hutchinson. (A-1184-1186; A-1752)

12. Defendants made conflicting statements concerning whether Lang replaced Mr. Hutchinson, whether no one replaced Hutchinson, and whether Ronald Danenberg (who never managed or co-managed the PEG) and defendant Greer replaced Mr. Hutchinson. (A-99; A-486-487; A-1184-1186) Defendants declined to disclose to the courts below that Mr. Hutchinson made contributions towards successful investments. (A-858-859)

13. Despite contemporaneous statements that investments on which Mr. Hutchinson worked were successful and worthwhile, defendants articulated post-hoc criticisms of the very same investments, and blamed Mr. Hutchinson for disappointing investment performance although some of the transactions were made before Mr. Hutchinson joined the firm and some were made after he had departed. (A-855-856; A863-864)

This Court's decision in *Reeves* instructs that a court need not *necessarily* find proof of pretext and proof of the de minimus prima facie case sufficient as a matter of law. The Court's decision in *St. Mary's Honor Center*, 509 U.S. at 511, 113 S. Ct. 2742 (emphasis in the original), also recognizes, however:

> "The factfinders' disbelief of the reason put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination."

Here, the Second Circuit explicitly required something more than evidence from which discrimination could be inferred. In the face of overwhelming evidence of Mr. Hutchinson's commendable job performance, the Second Circuit could not possibly have deemed the proof in this case "weak" without drawing inferences against the non-movant and making credibility determinations. While *Reeves* provides latitude in terms of the application of its teachings, that decision does not support a wholesale abandonment of the rules that restrict a court's role when confronted with summary judgment motions.

The Second Circuit also ignored defendants' presentation of shifting positions regarding: (a) who replaced Mr. Hutchinson, (b) the performance of the funds Mr. Hutchinson co-managed, (c) the performance of particular investments, and (d) the extent of Mr. Hutchinson's involvement in particular investments. Such evidence provided further basis upon which a rational jury could find the ultimate fact of intentional discrimination. *See St. Mary's Honor Center*, 509 U.S. at 511, 113 S. Ct. 2742. Once defendants displayed a lack of credibility regarding these and other facts, the courts below should not have given defendants the benefit of the doubt concerning whether Weiss, Peck acted with discriminatory intent ***after*** **such courts had found issues of fact concerning pretext.** (App. 6, 19) *Veritatem qui non libere pronunciat proditor est veritatis.*

CONCLUSION

In refining and clarifying the law in this area in *Reeves*, this Court held that proof of the prima facie case and pretext may satisfy a reasonable factfinder such that judgment as a matter of law may be inappropriate. The corollary stated in *Reeves* – that not every plaintiff must survive summary judgment based on such proof – has been distorted by the Second Circuit to the point where *Reeves* is meaningless in that Circuit. The exception has swallowed the rule.

In view of the anomaly created by the Second Circuit in the landscape of the other Circuit Court decisions, we respectfully urge this Court to grant a writ of certiorari and reverse the Second Circuit. The ADEA makes clear that a person "*shall* be entitled to a trial by jury of any issue of fact in any action" under that statute. 29 U.S.C. § 626(c)(2) (emphasis added). The Second Circuit has stripped away the fundamental and necessary function of a trial to determine issues of intent and other genuine factual issues in ADEA actions, and should not be left to continue to do so under the guise of following *Reeves*.

Respectfully submitted,

JEFFREY L. LIDDLE
Counsel of Record
LAURENCE S. MOY
LIDDLE & ROBINSON, L.L.P.
685 Third Avenue
New York, New York 10017
(212) 687-8500
Attorneys for Petitioner

New York, New York
March 12, 2001

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of December, two thousand.

PRESENT:

HONORABLE JOSEPH M. McLAUGHLIN,
HONORABLE ROBERT D. SACK,

Circuit Judges,

HONORABLE ROBERT N. CHATIGNY,*

District Judge.

---

*The Honorable Robert N. Chatigny, United States District Court Judge for the District of Connecticut, sitting by designation.

STEVEN N. HUTCHINSON,

Plaintiff-Appellant,

-v- No. 00-7351

WEISS, PECK & GREER, L.L.C., et al.,

Defendants-Appellees.

(Filed Dec. 13, 2000)

Appearing for Appellant: LAURENCE MOY, Liddle & Robinson, New York, NY.

Appearing for Appellee: HOWARD J. KAPLAN, Arkin, Kaplan, & Cohen, New York, NY.

Appeal from the United States District Court for the Southern District of New York (Sidney H. Stein, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be, and it hereby is, **AFFIRMED**.

Steven Hutchinson appeals from the judgment of the United States District Court for the Southern District of New York (Sidney H. Stein, *Judge*) granting summary judgment to the defendants ("WPG"). For the reasons set forth below, we affirm.

Defendant Weiss, Peck & Greer is an investment management firm. In July 1993, it hired Steven Hutchinson to be the co-manager of its Private Equity Group with

Wesley Lang, who had been acting as the manager since the prior manager left in early 1993. Hutchinson was 43 years old at the time he was hired; Lang was then 35 years old. Hutchinson, like every manager at WPG, was an "at will" employee. WPG fired Hutchinson in December 1997, when he was 48 years old. Hutchinson claims that WPG fired him because of his age and his desire to remain with the firm for another ten years. WPG insists that Hutchinson was fired for his poor performance.

Hutchinson filed a complaint on August 19, 1998, claiming age discrimination under the Age Discrimination and Employment Act (ADEA), 28 U.S.C. §621, and ten state law claims. The defendants moved to dismiss the complaint. In response, the district court stayed all state law claims and permitted discovery only on the age discrimination claim. At the close of discovery, WPG moved for summary judgment on the ADEA claim. The district court granted the motion on February 29, 1999, and dismissed the remaining state law claims for lack of subject matter jurisdiction.

The district court held that Hutchinson had not established a prima facie case of discrimination because he failed to show that his discharge occurred under circumstances giving rise to an inference of discrimination. The district court nevertheless assumed that Hutchinson had established a prima facie case and proceeded to consider whether the reasons provided by WPG were a pretext for age discrimination. The district court concluded that even if WPG's reason could be shown to be pretextual, there was no evidence from which a reasonable jury could find that WPG's stated reason was a pretext for age discrimination.

We review the district court's grant of summary judgment *de novo*, construing the evidence in the light most favorable to the non-moving party. *See Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir. 1999). Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," Fed. R. Civ. P. 56(c), i.e., "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). An issue of fact is "material" for these purposes if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The ADEA provides that it is "unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. §623(a)(1). In an employment discrimination case, the plaintiff has the initial burden of "proving by a preponderance of the evidence a prima facie case of discrimination." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). In order to establish a prima facie case, the plaintiff must show that he was "(1) within the protected age group; (2) qualified for the position; (3) discharged; and (4) that such discharge occurred under circumstances giving rise to an inference of discrimination." *Carlton v.*

Mystic Transportation, Inc., 202 F.3d 129, 134 (2d Cir. 2000); *Norton v. Sam's Club*, 145 F.3d 114, 118 (2d Cir. 1998). The burden of establishing a prima facie case has been characterized as "minimal." *Carlton*, 202 F.3d at 134 (citations omitted).

If the plaintiff establishes a prima facie case, a rebuttable presumption of discrimination arises. *See Id.* The burden of production then shifts to the employer to articulate a legitimate, non-discriminatory reason for discharging the employee. *See id.* If the employer articulates a non-discriminatory reason for its employment decision, the presumption of discrimination raised by the prima facie case "simply drops out of the picture." *St. Mary's Honor Ctr.*, 509 U.S. at 510-11. Then the plaintiff has the burden of proving that his age was the real reason for his discharge. A prima facie case plus evidence of falsity is neither necessarily sufficient nor necessarily insufficient to survive a motion for summary judgment. *See Reeves v. Sanderson Plumbing Prod., Inc.*, 120 S. Ct. 2097, 2108-09 (2000). Rather, a court must decide whether the plaintiff introduced enough evidence – either at the prima facie case level, by demonstrating pretext, or by evidence in addition to these – that considering the sum of all evidence, reasonable people could find that discrimination existed. *See Schnabel v. Abramson*, 2000 WL 1676601, at *7 (2d Cir. 2000).

Our cases establish that "the burden of proof that must be met to permit an employment-discrimination plaintiff to survive a summary judgment motion at the prima facie stage is de minimis." *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994). An inference of age discrimination can be established by evidence that

the discharged employee was replaced by a younger employee. *See id.* We assume for purposes of this decision that Lang, who was younger than Hutchinson, replaced Hutchinson and that Hutchinson therefore made a prima facie case of age discrimination. Additionally, despite the fact that there is overwhelming evidence in the record that Hutchinson's performance both as an investor and as a manager was poor, we assume that WPG's stated reason for firing Hutchinson – poor performance – was pretextual.

Even if WPG's stated reason for firing Hutchinson was pretextual, the evidence is insufficient to support a reasonable inference that it was a pretext for age discrimination. As the Supreme Court held in *Reeves*, whether a prima facie case plus an employer's pretextual reason for firing is sufficient to overcome a motion for summary judgment depends on "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case. . . . " *Reeves*, 120 S. Ct. at 2109. Hutchinson's prima facie case is extremely weak. He has very little evidence that the employer's explanation is false, and the evidence he offers does not permit an inference that the actual reason for his termination was related to his age. Thus, Hutchinson's prima facie case plus his proof that WPG's reason for his termination was pretextual does not provide evidence from which a reasonable jury could conclude that Hutchinson was terminated because of his age.

For these reasons, the opinion of the district court is AFFIRMED.

FOR THE COURT:
ROSEANN B. MACKECHNIE,
Clerk

/s/ Lucille Carr
By:

12/13/00
Date

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

———————————————X

STEVEN N HUTCHINSON,

Plaintiff,

-against-

WEISS, PECK & GREER LLC, ET.AL.,

Defendants.

———————————————X

98 CIVIL 5915 (SHS)

JUDGMENT

(Filed Feb. 29, 2000)

Defendants having moved for summary judgment and the matter having come before the Honorable Sidney H Stein, United States District Judge, and the Court on February 29, 2000 having rendered its Order of Dismissal granting defendants' motion for summary judgment and dismissing plaintiff's claim of age discrimination and dismissing all other claims for lack of subject matter jurisdiction, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order of Dismissal dated February 29, 2000, defendants' motion for summary judgment on claims of age discrimination is hereby granted

and all other claims are dismissed for lack of subject matter jurisdiction.

Dated: New York, New York
February 29, 2000

JAMES M. PARKISON
Clerk of Court

BY: /s/
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVEN N. HUTCHINSON,

Plaintiff,

v. 98 Civ. 5915 (SHS)

WEISS PECK & GREER, L.L.C., et al.,

Defendants.

New York, N.Y.

February 29, 2000

9:00 a.m.

Before:

HON. SIDNEY H. STEIN,

District Judge

APPEARANCES

LIDDLE & ROBINSON, L.L.P.

Attorneys for Plaintiff

BY: LAURENCE S. MOY

ARKIN SCHAFFER & KAPLAN LLP

Attorneys for Defendants

BY: HOWARD J. KAPLAN

[2] (Case called)

THE COURT: Please be seated, gentlemen.

I brought you in today in order to read the decision on defendants' motion for summary judgment. Sometimes it is simpler to be able to read a decision rather than

spend the additional time to make it as near perfect as possible.

So, what I am going to do is read the opinion into the record and then I will sign a minute order that simply says for the reasons set forth on the record that I am granting the motion for summary judgment dismissing plaintiff's age discrimination claim.

You will remember what happened earlier in this case, obviously, where I stayed discovery on everything except the age discrimination claim because I wanted to focus on that and that was the nexus for federal jurisdiction. Under United Mine Workers, [sic] because I am granting the motion for summary judgment on the age discrimination claim, I am not going to accept jurisdiction of the state claims. So in terms of the federal court, this case is going to be dismissed.

My opinion is as follows:

Plaintiff is a former employee of defendant Weiss Peck & Greer, L.L.C. He was hired in 1995 at the age of 43 after interviewing with defendants Wesley Lang, Philip Greer and Stephen Weiss. He and Lang served as co-managers of the Private Equity Group. Lang, who had joined Weiss Peck & Greer [3] in 1985 and had become a partner in 1987, began serving as the sole manager of the Private Equity Group starting in 1993. Greer and Weiss were co-founders of Weiss Peck & Greer.

In December of 1997, Weiss Peck & Greer terminated Hutchinson's employment. He was 48 at that time. As a result of his termination, Lang once again became the sole manager of the Private Equity Group.

Hutchinson believes that he was discharged on account of his age, and that Weiss Peck & Greer violated a variety of legal obligations in terminating him. Obviously, Weiss Peck & Greer states that it fired him for good cause.

The exact contours of Hutchinson's responsibilities at the firm are in dispute. Weiss Peck & Greer argues that Hutchinson was hired to cultivate new investments. Hutchinson stresses fundraising efforts as a principal responsibility. Both sides agree that Hutchinson's duties included managing the existing investments of Private Equity Group funds.

The parties also dispute the quality of Hutchinson's performance during his two-year tenure. Weiss Peck & Greer argues that mismanagement by Hutchinson cost the firm millions of dollars in investment losses and that his leadership style sowed division and discouraged productive criticism among his subordinates. That's the Lang affidavit at paragraph 20; Greer deposition at 212, Kaplan affidavit Exhibit B, Hutchinson claims he was never warned about any performance [4] problems by anyone. He contends that Weiss Peck & Greer remained optimistic about the performance of the investments he managed up until the time he was terminated. He believes that his problems with Weiss Peck & Greer began when he told a group of Private Equity Group employees that he planned on staying with the company for at least ten more years. That's in his affidavit at paragraph 15.

Plaintiff here alleges a claim of age discrimination pursuant to the ADEA, 29 U.S.C. Section 623 et seq., and, as I said, several causes of action pursuant to state law.

By order dated January 15, 1999, I denied without prejudice an earlier motion to dismiss or, in the alternative, for summary judgment, and I directed discovery to proceed on the age discrimination claim in order for me to be able to determine whether there was subject matter jurisdiction here. That discovery has ended and, as I said, defendants moved for summary judgment on the ADEA claim.

I am granting defendants' motion and all remaining state claims are being dismissed for lack of subject matter jurisdiction.

I am not going to set forth the standard for summary judgment. You gentlemen know it. I will simply cite Allen v. Coughlin, 64 F.3d 77, 79 (2d Cir. 1995).

The ADEA forbids employers from discriminating in the hiring, discharge or setting of terms of employment by reason [5] of the age of an employee. 29 U.S.C. Section 629(a). Protection extends to employees who are at least 40 years old. See 29 U.S.A. [sic] Section 631(a).

The Second Circuit requires me to use the three step burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803-805 (1973). For analysis purposes I will take the steps one by one.

The first step requires that plaintiff bear an initial minimal burden of establishing a prima facie case. That can be accomplished by the plaintiff showing that he was within the protected age group, that he was qualified for the job at issue, that he was discharged, and that the discharge occurred under circumstances giving rise to an

inference of age discrimination. See Hollander v. American Cyanamid, 172 F.3d 192, 199 (2d Cir. 1999). An inference of age discrimination can be established, among other means, by evidence that the discharged employee's replacement was younger or by a pattern of firing older workers. In addition to Hollander, see Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 37 (2d Cir. 1994).

Plaintiff can readily establish the first three requirements of the prima facie case, that is, that he is within the protected age group, that he was qualified, and that he was discharged. I find, however, that he fails to show that his discharge occurred under circumstances giving [6] rise to an inference of age discrimination; therefore, he has not established a prima facie case.

The heart of Hutchinson's claim is that he was replaced by Wesley Lang who was 40 years old. Hutchinson and Lang were co-managers of the Private Equity Group prior to Hutchinson's termination, and after his termination Lang became the sole manager. Hutchinson's position is that because Lang took over all of Hutchinson's responsibilities, therefore Lang is Hutchinson's replacement.

The record in this case, however, offers undisputed facts which do not support the claim that Lang was Hutchinson's replacement. Lang was hired by Weiss Peck & Greer in 1983. He joined the Private Equity Group in 1985. He became a partner of Weiss Peck & Greer in 1987 and became manager of the Private Equity Group in 1993. See Lang affidavit at paragraph 283. He therefore was the sole manager before Weiss Peck & Greer even hired the then 43-year-old Hutchinson as co-manager in 1995, and

Lang again became the sole manager after Weiss Peck & Greer terminated the by then 48-year-old Hutchinson. In fact, Lang had participated in the original decision to hire Hutchinson. That's the Lang affidavit at paragraph 6. Lang also became a member of the Weiss Peck & Greer Executive Committee in 1995, something that Hutchinson never attained. That's the Lang affidavit at paragraph 8.

[7] Now, I have looked at the case just sent to me, the Second Circuit case Carlton v. Mystic Transportation, Inc. That case is not this. In Carlton, a fired employee's duties were divided between two much younger employees, one of whom had just been hired. Instead, here, Lang had previously held the position and participated in the decision to hire Hutchinson, was senior to Hutchinson, that is, he was on the Executive Committee, and his job description did not change once Hutchinson left. Under these facts, I find that Lang's assumption of Hutchinson's duties is not adequate to create an inference of discrimination.

Hutchinson offers a variety of other claims which I will deal with briefly. He contends that Weiss Peck & Greer retained many other people who were younger than Hutchinson and they fired a large number of older people. However, none of these statistical claims were presented in a way which make them probative of age discrimination. I will go into that in a moment.

Second, he argues that he was subject to one direct comment about his age while employed by Weiss Peck & Greer. A subordinate named Craig Whiting allegedly once said that he wanted Hutchinson to attend a meeting with an older man since the plaintiff was the Private

Equity Group's "gray-haired" man. Hutchinson himself says that at paragraph 54 of his affidavit. In fact, Hutchinson regarded the comment as a compliment. I cite the Hutchinson affidavit at paragraph 48, Exhibit E. The stray comment doctrine was designed for just this situation. I also cite Woroski v. Nashua Corp., 31 F.3d 105, 109-110 (2d Cir. 1994). Even if the comment in fact was negative, and there is no evidence in that regard, Whiting was not a decision maker in connection with the decision to terminate Hutchinson; he simply provided input to the Executive Committee about Hutchinson's performance.

Last, plaintiff speculates that he was fired as a result of his informing the members of the Private Equity Group that he planned to work at the company for ten more years, as I have stated. This was made allegedly in a meeting in June of 1997. Hutchinson says the reaction was stunned silence. See the Hutchinson affidavit at paragraph 15. However, there is absolutely nothing in the record to indicate that this comment had any role to play in the termination of Hutchinson in December of 1997.

I therefore find that plaintiff has not met even the minimal burden of showing that his discharge occurred in circumstances giving rise to an inference of discrimination.

However, I am going to go on, and I am going to assume for purposes of analysis that Hutchinson has established a prima facie case. I think that's the proper way to do it for a variety of reasons, not the least of which is if the Second Circuit disagrees with my analysis on the prima [9] facie case, this will give the Second Circuit an additional indication of my thinking on the

case because I do think that even if he has proven a prima facie case, the result is still the same – that is, that the motion should be granted – when I go on and analyze the other steps after the prima facie case.

In connection with stage two, that is, once a plaintiff has established a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the discharge. That's Hollander at 199.

Weiss Peck & Greer has offered evidence that plaintiff's performance was poor, and thus his termination was merited. According to Weiss Peck & Greer, plaintiff's responsibilities as co-manager included leading six investments, all of which it claims lost money. That's the Lang affidavit at paragraphs 20 to 26. Hutchinson's boss Greer has testified that he became concerned about plaintiff's performance in 1996, and that his concerns increased over the coming year. That's the Greer deposition at 19 and 105-106. Other employees shared similar concerns about Hutchinson's performance with Greer. See the Pfister deposition at 67.

Weiss Peck & Greer also offers evidence that Hutchinson managed and led the staff of the Private Equity Group ineffectively. Specifically, there is evidence that he [10] had a tendency to get angry with views that differ with his own and this caused friction. See the Pfister deposition at 75.

I therefore find that the employer has shown legitimate, nondiscriminatory reasons for the discharged plaintiff.

Now, in regard to step three, the plaintiff must show sufficient evidence for a reasonable jury to conclude that the legitimate, nondiscriminatory reason is pretextual for age discrimination. That's Hollander at 200. "(S)ome evidence is not sufficient to withstand a properly supported motion for summary judgment; a plaintiff opposing such a motion must produce sufficient evidence to support a rational finding that the legitimate, nondiscriminatory reasons proffered by the employer were false, and that more likely than not the employee's age was the real reason for the discharge." Woroski v. Nashua Corp. at 109-110. The plaintiff must "offer concrete particulars to substantiate his claim." O'Sullivan v. New York Times, 37 F.Supp.2d 307, 314 (S.D.N.Y. 1999).

Plaintiff contends that he has met this burden by showing that the alleged discriminatory reasons are not true and are thus a pretext; second, that Hutchinson was never warned by Weiss Peck & Greer concerning his poor performance, again allegedly showing that those grounds are pretextual; three, that his prima facie case shows circumstances from [11] which one could infer discrimination; and four, that the employer maintains a pattern of age discrimination in their discharge decisions.

The question of whether plaintiff's poor performance was a pretext for another motivation depends upon resolving factual disputes. Hutchinson disputes his employer's description of his job responsibilities and the success of his investments claiming that they were performing well. As proof, he points to his testimony, to the Private Equity Group's own contemporaneous descriptions of the investments, and to increases in his salary and bonuses. That's his affidavit at paragraph 13. He also

contends that the Private Equity Group employees were sophisticated and strong-minded professionals who could not have been bullied by his leadership style. That's plaintiff's affidavit at paragraph 48. He finally claims he was never warned of his problems. That's his affidavit at paragraph 53. For its part, Weiss Peck & Greer disputes that it never warned Hutchinson of dissatisfaction with his performance. That's the Lang deposition at 114, Kaplan affidavit Exhibit D. The employer also points to a complaint from a third-party investor – that's the Prim deposition – and contemporaneous complaints by Weiss Peck & Greer employees in which Hutchinson's poor performance was discussed as evidence that the employer's articulated reason was not a pretext I cite the Prim [12] deposition at paragraph 18, Kaplan affidavit Exhibit J; Whiting deposition at 4, Kaplan affidavit Exhibit F, Pfister deposition at 75, Kaplan affidavit Exhibit E.

In any case, there is a factual dispute regarding whether these reasons are pretextual. Assuming for purposes of this argument that Hutchinson has shown they are pretextual, he must also offer evidence that the reason was more likely than not a pretext for age discrimination. That's Hollander, 172 F.3d at 200. This Hutchinson has not done. As I set forth above, the circumstances of his departure and his purported replacement by Lang does not give rise to an inference of discrimination. Lang participated in the decision to hire plaintiff, had been the sole manager of the Private Equity Group prior to plaintiff's joining the firm, had been an employee of the firm for a decade longer than plaintiff, and was a member of its Executive Committee.

I think more importantly, his job description did not change once plaintiff was terminated. It is true that Lang once again became the sole manager of the Private Equity Group, but that simply reflects the fact that there was no longer another co-manager to share responsibility. My conclusion on this motion is reinforced in this third step of the analysis where the plaintiff bears the burden of establishing a material fact and articulating his proof with a new level of specificity. See Raskin v. Wyatt Co., 125 F.3d [13] 55, 64 (2d Cir. 1997), and Viola v. Philips Medical Systems of North America, 42 F.3d 712, 717 (2d Cir. 1994). In addition, many of the same parties, including Lang and Greer, participated in the decision to hire and fire Hutchinson, and the decision was separated by several years. Where the same actor makes both the decision to hire and fire an employee, there is a strong inference that discrimination was not a motivating factor. That's the case that one of the parties just cited, Carlton v. Mystic Transportation. The additional contentions made by Hutchinson and discussed earlier do not suffice to raise a material issue of fact.

Hutchinson's evidence of a pattern of discrimination is inadmissible as an evidentiary matter and therefore the statistical argument is unsubstantiated. A district court has broad discretion in excluding statistical evidence on the grounds that it is unreliable or unhelpful. That's Hollander at 202-204 and Cobbs v. CBS Broad, Inc., 1999 WL 244099, *7-8 (S.D.N.Y.), and Sutton v. Toshiba America, Inc., 1999 WL 335670, *3 (S.D.N.Y.). Specifically, plaintiff contends that 12 of the 16 individuals discharged by the employer between 1993 and 1997 were more than 40 years old. However, the sample size here is small; there is

no indication as to whether the 16 people held jobs that were comparable to plaintiff's; there is no indication at all of the reasons offered for the terminations; there is no evidence concerning [14] the average age of Weiss Peck & Greer employees; there is no evidence of the ages of the replacement employees, for that matter, whether these terminated employees were in fact replaced. Plaintiff's claim that the firm retained many younger people is plagued by the same lack of incompleteness and statistical reliability. These statistics I find not probative of age discrimination.

Taking the evidence as a whole and drawing all inferences in plaintiff's favor, I find that a reasonable juror cannot find that Weiss Peck & Greer discharged Hutchinson on the basis of his age.

As I said before, the ADEA claim is the sole federal cause of action here. I am declining to exercise supplemental jurisdiction over the remaining state claims pursuant to United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966), as well as 28 U.S.C. Section 1367(c)(3). I am therefore dismissing the ADEA claim on its merits and all other claims for lack of subject matter jurisdiction.

All right, gentlemen. You have the decision. As I said, I am going to sign a minute order. It's up to the parties what to do next. Thank you very much.

MR. MOY: Plaintiff respectfully takes exception to the order. Thank you, your Honor.

THE COURT: I understand. Of course.